Supreme Court, U.S.
FILED
09-443 AUG 29 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES A. BUCK, JR

Petitioner,

v.

INTERNAL REVENUE SERVICE

Respondent(s).

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit
Office Of The Clerk
St. Louis, MO. 63102

PETITION FOR WRIT OF CERTIORARI

JAMES A. BUCK, JR., - *Pro Se*
12570 Danube Drive
Florissant, Mo. 63033
(314) 837-8996

I. QUESTION PRESENTED FOR REVIEW

When the Federal District Court and the Federal Appeals Court denied James Buck Jr. a Trial by jury via a Summary Judgment or a Favorable decision on his Racial Discrimination, Retaliation, and Wrongful Termination Claims against his former employer, the Internal Revenue Service, were his Title VII Civil Rights and Federal Equal Employment Opportunity Laws violated, were precedented Law practices not followed, and were the courts erroneous in their decisions, which deprived Mr. Buck of Due Process of the Law, a trial by Jury, and a Fair Decision?

LIST OF PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

[ ] I All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

OFFICIAL REPORTS Appendix - (App.)

James A. Buck, Jr. v. Department of The Treasury, U.S. Court of Appeals, 8th Circuit, *Judgment*, May 13, 2009..... Appendix...A.....App. 1

James A. Buck, Jr. v. Department of The Treasury, U.S. Court of Appeals, 8th Circuit, *Petition For Rehearing Denial*, June 26, 2009....B.....App. 5

James A Buck, Jr. v. Department of The Treasury, U.S. District Court Eastern District of Missouri, Eastern Division, *Judgment*, October 10, 2007 .....C....App. 7

James A. Buck, Jr. v. Department of The Treasury, U.S.A. Merit Systems Protection Board - *Final Order*, August 15, 2006... .....D...App. 26

James A. Buck, Jr. v. Department of The Treasury, U.S.A. Merit Systems Protection Board - *Initial Decision*, May 15, 2006.....E....App. 33

II. TABLE OF CONTENTS

I. QUESTION PRESENTED FOR REVIEW .....page # i
II. TABLE OF CONTENTS iii
III. TABLE OF AUTHORITIES vi
IV. OPINIONS BELOW 1
V. BASIS FOR JURISDICTION OF THIS COURT.. 1
A. Date of Orders to Be Reviewed 1
B. Jurisdictional Basis For Review 2
VI. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.....2
VII. STATEMENT OF THE CASE 3
VIII. STATEMENT OF MATERIAL FACTS 6
IX. TREATMENT OF THE ISSUES BELOW ...18
X. ARGUMENT AS TO THE NECESSITY OF REVIEW 22
A. When the U.S. DISTRICT COURT JUDGE made his decision and the Appeals Court affirmed it, were the issues of Retaliation, Racial Discrimination, and Wrongful Termination; the Facts, Circumstances, and Exhibits for making a reasonable decision in this case pertaining to treatment of applicable Title VII laws, departure from accepted and usual course of judicial treatment with the case, and the violating appellant's rights, appropriately

II. **TABLE OF CONTENTS** - Continued

considered? 22

i. The appellant was given a summary judgment, deprived of justice via a departure from accepted and usual course of judicial treatment of this case, and had his Title VII rights violated. The District Court gave substantial and undue weight to the appellee's Information, while not seeing, ignoring or taking lightly persuasive and Substantial written evidence provided by the appellant..Exhs, P-35, 40, 43, 47, 48, 49, 50. The Appeals court affirmed the District Court's decision and departed from usual course of judicial proceedings by it's treatment of this case.....22

ii. The petitioner / Appellant made an adequate showing of performance problems and harm to require a favorable decision or remand..... 21

XI. CONCLUSION 35

APPENDIX

James A. Buck, Jr. v. Department of The Treasury, U.S. Court of Appeals, 8th Circuit, *Judgment*, May 13, 2009..... Appendix...A.....App. 1

James A. Buck, Jr. v. Department of The Treasury, U.S. Court of Appeals, 8th Circuit, *Petition For Rehearing Denial*, June 26, 2009....B....App. 5

James A Buck, Jr. v. Department of The Treasury, U.S. District Court Eastern District of Missouri, Eastern Division, *Judgment*, October 10, 2007 .....C....App. 7

James A. Buck, Jr. v. Department of The Treasury, U.S.A. Merit Systems Protection Board - *Final Order*, August 15, 2006. .....D...App. 26

James A. Buck, Jr. v. Department of The Treasury, U.S.A. Merit Systems Protection Board - *Initial Decision,* May 15, 2006.....E...App. 33

III. TABLE OF AUTHORITIES

Federal Cases **Page #**

Anderson v. Liberty, Inc., 477 U.S. 242, 248 (1986).....

Cardenas v. A T & T Corp., 245, F.3d 994, 998 (8th Cir. 2001).....24, 26, 30, 33, 36

Clark County School District v. Breeden, 532 U.S. 268, 273. (2001).....35

Conner v. Schnuk Markets, Inc., 121 F.3d 1390, 1395 (CA 10), (1997).....36

Consolidated Edison Co. v. National Labor Relation Board, 305 *U.S.*197,299 (1938).....

Crawford v. Runyon, Postmaster General USPS, 37 F.3d 1338, 1340 (8th Cir.1994) 27

Equal Employment Opportunity Commission v. Kohler Co., 335 F.3d 766, 772 (8th Cir. 2003).....28

Gilooly v. Mo. Dep't of Health & Senior Servs., 421 F.3d 734, 739 (8th Cir. 2005). E.E.O.C. v Kohler Co., 335 F.3d 766, 776 (8th Cir. 2003)....., 28

Gorman-Bakos v. Cornell Cooperative Extension of Schenectady Cty., 252 F.3d 545, 554 (CA 2001) ..35

Hildebrand v. M-Tron Industries, Inc., 827 F.2d 363, 364 (8th Cir. 1987).....27

Johnson v. Minnesota Historical Socy, 931 F.fd 1239, 1244 (8th Cir.1 991) 27

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 23, 27, 28

III. TABLE OF AUTHORITIES - Continued

Osborn v. E.F. Hutton & Co., Inc., 853 F.2d 616, 618 (8th Cir. 1988) *citing Celotex Corp.*, 477 U.S. at 322-323.....37

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51, 120 S. Ct. 2097, 147 L. Ed 2d 105 (2000).....27

Salitros v. Chrsyler Corp., 306 F.3d 562 (8th Cir. 2002).....27

Sherpell v. Humnoke School District No. 5 of Lonoke County, Ark. 874 F.2d 536.....20

Smith v. St. Louis Univ., 109 F.3d 1261, 1266 (8th Cir. 1997).....10

St. Mary's Honor Center v. Hick, 509 U.S. 502 (1993).....

Tolen v Ashcroft, 377 F.3d 879,881 (8th Cir. 2004), *Clark v. Runyon*, 218 F.3d 915, 918 (8th Cir. 2000). .....

United States of America v. Cadenas, 445 F.3d 1091 (2006) 24, 26, 30, 33, 36

U..S. Postal Service Bd. Of Govenors v. Aikens, 460 U.S. 711, 717, 103, S. ct. 1478, 75 L.Ed. 2d 403 (1983) .....

Federal Constitution and Statute

5 C.F.R. Section 1201.56(c)(2)(2005).....2, 21, 27, 30, 33, 36, 37

III. TABLE OF AUTHORITIES - Continued

5 U.S.C. 2302(B)(1) and related; 2, 23, 31
5 U.S.C. 2302(B)(2) and related; 2, 23, 31
5 U.S.C. Section 7703(c), 411 U.S. 792 (1973) and related.....2, 21, 23, 31, 32
28U.S.C.Sec. 1254(1).....2
28 U.S.C. Sec. 1257 2
42 U.S.C. Sec. 2000e-3 .....3, 23, 26, 29, 31

Title VII Civil Rights Acts of 1964, Sec. 701 et. seq., 42 U.S.C.A. sec. 2000e et. Seq. ...2, 22,23, 26, 29, 31

* - is a page # in the Appellant's Reply Brief.

IV. OPINIONS BELOW

OFFICIAL REPORTS Appendix - (App.)

James A. Buck, Jr. v. Department of The Treasury, U.S. Court of Appeals, 8th Circuit, *Judgment*, May 13, 2009..... Appendix...A.....App. 1

James A. Buck, Jr. v. Department of The Treasury, U.S. Court of Appeals, 8th Circuit, *Petition For Rehearing Denial*, June 26, 2009....B....App. 5

James A Buck, Jr. v. Department of The Treasury, U.S. District Court Eastern District of Missouri, Eastern Division, *Judgment*, October 10, 2007 .....C....App. 7

James A. Buck, Jr. v. Department of The Treasury, U.S.A. Merit Systems Protection Board - *Final Order*, August 15, 2006. .....D...App. 26

James A. Buck, Jr. v. Department of The Treasury, U.S.A. Merit Systems Protection Board - *Initial Decision*, May 15, 2006.....E....App. 33

V. BASIS FOR JURISDICTION OF THIS COURT

A. Date of Orders to be Reviewed.

On May 13, 2009, a panel of The United States Court of Appeals for the Eighth Circuit Court,

comprised of Judges Wollman, Murphy, and Melloy, filed an opinion affirming the District Court's decision on Mr. James Buck, Jr.' s Employment-discrimination, retaliation, and wrongful-discharge suit against his former employer, the Internal Revenue Service, which are presented in this petition. On June 26, 2009 Mr. Buck's Petition for Rehearing was denied. See the List of Parties also.

B. Jurisdictional Bases For Review

Under the provisions of 5 U.S.C. 2302(B)(2) and related, Title VII Civil Rights Acts of 1964, Sec. 701 et. Seq., 42 U.S.C.A. Sec. 2000e et. Seq. and related, 5 U.S.C. sec. 7703(c), 411 U.S. 792 and related, 28 U.S.C. sec. 1257, 28 U.S.C. 1254 (1) and others. This court has jurisdiction to review the final order of a lower court of last resort.

VI. CONSTITUIONAL PROVISIONS, STATUTES AND RULES

This petition involves the Federal Civil Rights Act, Laws, and Statutes, and Federal Equal Employment Opportunity Laws and Statutes. These laws provide for Discrimination, Retaliation and Termination of Employment.

5 U.S.C. section 7703(c), 411 U.S. 792 (1973) and related; 5 U.S.C. 2302(B(1) & (2) and related; *Title VII Civil Rights Acts of 1964, sec. 701 et. Seq;* 42 U.S.C. sec. 2000e et. Seq.; 5 U.S.C. sec. 7703(c); and related. 5 C.F.R.. Section 1201,56(c)(2)(205). "It shall be an unlawful employment practice for an employer

to discriminate against any of his employees ... because the employee has made a charge ...under this subchapter." 42 U.S.C. Sec. 2000e -3. This section also prohibits any retaliatory conduct that is reasonably likely to deter protected activity.

VII. STATEMENT OF THE CASE

On 1-6-06 the Internal Revenue Service (IRS) removed the appellant James Buck (Buck) from it's employment, stating that the appellant did not successfully complete a Performance Improvement Period (PIP). The appellant was terminated. He subsequently filed for an administrative hearing with the Merit System Protection Board (MSPB) on May 15, 2006, which ruled in the IRS's favor. The appellant filed a petition for review with the MSPB on June 16, 2006 which upheld the decision. On August 25th, 2006 the appellant filed a complaint with the United States District Court, Eastern District of Missouri, Eastern Division, appealing this decision. This court ruled against the appellant on October 10th, 2007 via summary judgment. The appellant filed timely filed an appeal on to the United States Court Of Appeals on October 30th, 2007. This court also ruled against the appellant and confirmed the District Court's decision on May 13, 2009. A Petition for Rehearing was filed on June 4, 2009, and denied on June 26, 2009.

The Plaintiff is contesting his removal from employment by the defendant and is alleging Retaliation for prior Equal Employment Opportunity complaints and litigation made by him against the

agency; Discrimination by the agency, when allowing the appellant to be adversely treated while a similarly situated White employee was not treated the same; Disparate and Other Discriminatory and retaliatory treatment that adversely affected the appellant; and Procedural errors and wrongs by the agency in the execution of the PIP the appellant was placed on and allegedly failed, which is the agency's alleged basis for his removal.

Also contested is the decision made by the District Court Judge pertaining to these issues. The judge ruled that "there is no genuine issue of material fact" and granted a summary judgment for the defendant. The Plaintiff argues that there are genuine issues of material fact and there should have been a judgment in his favor, or at a minimum, a jury trial.

Also contested are the errors in the MSPB Judge's and the District Court Judge's rationale and determinations, that are adverse to the Plaintiff. (i.e. they ignored and / or omitted substantive, evidential, and relevant persuasive facts and documentation that supports the Plaintiff). They gave substantial and undue weight to the appellee's information. **For examples**, The judges don't address the facts that before, during and after the Plaintiffs' PIP, and after his removal, there **were pending, unresolved and being currently litigated, EEO complaint cases by Mr. Buck, involving and against Victoria Gally** (Gally), the SBSE Territory Manager (TM) and official that recommended and assisted in the removal of the appellant, others, and against agency;

and that the appellant did not have a bias free environment to allegedly improve his performance. Within 21 months time, Folk, under Gally's management, brought the appellant's performance ratings down from Outstanding, to failing, and then with Danielle Douglass' (Douglass) help, to termination. Performance issues were raised and harassment made to deter and punish Mr. Buck for the EEO filings and concurrent activity against and involving Gally and the agency. It seems unlikely that the agency would be willing to fairly help and appellant when he has pending and unresolved EEO complaints against it. Also the judges did not consider and / or ignored rating qualification statements from the agency, relating to the appellant, and the comparable employee. They simply stated that the appellant was not qualified, which is contrary to the documentation provided by the appellant and the appellee. The judges simply swept over and gave little weight to the appellant's evidence and statements offered. Although the District Court judge found that the appellant met two of the three requirements for his discrimination and retaliation claims, the judge failed to acknowledge or see the supportive documentation of the appellant for the third element for discrimination, that was allegedly not met, (i.e. the qualification statement referred to above). The judges also did not acknowledge the "collusion aspects" of Gally, her two managers – Folk, and Douglass, and the LMSB division's non reassignment of the appellant. Also, not given much weight is "whether the appellant's evidence permits a

reasonable inference of discrimination or retaliation" and that a jury should hear the case. The judges appear to ignore the one sided and continued vendetta that Folk had against the appellant, and Douglass' 17 Positive Evaluations of the appellant during the PIP.

The Appellant is also contesting the Appeals Court ruling, which affirms the District Court's decision for the aforementioned and same reasons. Also see the Petition for Rehearing. The appellant was not afforded the proper consideration and justice allowed by the justice system. Justice was not served and the appellant is appealing.

VIII. STATEMENT OF MATERIAL FACTS

Appellant Background and Accomplishments

Education

The appellant has a Bachelor's degree in Business Administration – Accounting, a Masters in Business Administration (MBA)-Acc'tg./ Mgmt., and a Masters Degree (M.A.) in business Mgmt. - Finance. He has successfully completed the required Five Basic phases of IRS Revenue Agent Training, and years of many other supplemental, advanced, and required training classes provided by the IRS, (Ex. P-1).

Work Experience

The appellant has worked for the Internal Revenue Service (IRS) for more than Twenty (20) years as a Revenue Agent conducting tax audits on Individuals,

Corporations, S- Corporations, Partnerships, and other entities. Approx. 9 yrs. were spent in the Large Case (LMSB) division, formerly the District Control Large Case division, and 11 yrs. in the Small Business / Self Employed (SBSE) division, formerly General Program division (Ex.P- 1). He conducted audits individually, and worked as a team member in both Divisions, (Ex.P-1). The appellant was a subject presenter in an IRS training seminar, completed IRS' Basic Instructor Training, and was loaned out, and paid by the IRS, as an Accounting and Auditing Instructor for an Area College, for a year, (Ex. P-6). The appellant has received many performance awards, Very good, and Outstanding Annual Evaluations, (Exs.P-2, 3, 4, 5, 10, 11, & 12), and a Manager's award (Ex. P-7) for his performance. He was asked, and agreed on several occasions, to be Acting Group Manager, in the Managers' absence, (Ex.P-9). He was certified on three occasions, as ready for management, (Ex.P-8), "once by Folk, the initiator of Buck' PIP". On many occasions, the appellant was certified and highly ranked for Grade 13 level promotions (Ex. P-41, & 64), but denied.

Equal Employment Opportunity Complaints (EEO)

After being denied Grade 13 promotions, the appellant filed 3 EEO complaints. The complaints involved and named Gally, the TM of the Small Business Self-Employed (SBSE) division of the IRS, who proposed and assisted in the removal of the Appellant from his position; and one EEO complaint was also against Thomas Simms (Simms), the TM of

the Large and Midsize Business (LMSB) division of the IRS. The complaints stated that they discriminated and / or was involved in discrimination,and retaliation, against the appellant.

Retaliation & Discrimination - Prohibited practices, - see the following.

Wrongful Termination

The appellant is claiming retaliation and discrimination by Gally, Simms, Joe Folk (Folk), Danielle Douglass (Douglass), Farris Fink (Fink), (i.e. Management), and the Agency as a whole, (i.e. SBSE, LMSB divisions, etc.) See (Ex. P-25, 18, & 19). These are the most primary participants, but there are other managers who were involved. After the appellant filed three (3) EEO complaints against the appellee (Exs. P-35, 37, & 38), his work performance evaluations began to immediately and significantly decrease in ratings, subsequently rated as failing, from outstanding to failing within approximately 21months, under the same manager, Folk, and the same TM – Gally. (Exs. P-10, 11, 12, 13, 14, 15, 17, 18, 19, & 44 thru 63), he was terminated (Ex.P-23) for allegedly failing the PIP. Prior to Gally becoming the TM, Folk had rated and given the appellant an outstanding and the very good annual evaluations, and certified him for management. When Gally became Buck's TM, Performance issues were raised and harassment made to deter and punish Mr. Buck for the EEO filings and concurrent activity against and involving Gally and the agency.

By Agency and Management

Small Business, Self-Employed Division (SBSE)

Via - Victoria Gally, White female.

1. Retaliation because of EEO complaints and related current litigation activity involving and against Gally. (Ex. P-35, 37, 38). Performance issues were raised and harassment made to deter and punish Mr. Buck for the EEO filings and concurrent activity against and involving Gally and the gency.

2. Disparate treatment – For example: see (Exh. P-19, pg. 1, para.3).

3. James was not given comparable job placement reassignment another area of the IRS in lieu of dismissal, as was at least one other Agent – Lewis Leeker, a White Male, Revenue Agent and comparable employee. Lewis was given a PIP also, but was allowed to be reassigned as a Revenue Agent to a prior job position. (Ex. P-31, #12; District Court Memorandum and Order, pg. 9, lines 1thru 8, Oct. 10th, 2007;) James was not allowed to do the same, where his prior performance rating in that LMSB job was Outstanding (Ex. P-4). There were openings in that Division prior to the appellant's PIP, during the PIP, and after the PIP, (Ex.P-41, pgs. 2, 4, 5, 10, 12, 13). The appellant was also qualified for the job that Mr. Leeker was reassigned too, where there were openings at grade 12 and 13 levels, (Ex. P-41, pgs. 7, 8,14).

4. James was Apparently –**"Black Balled"** in the SBSE division, in other IRS divisions, and with at least 2 others from out of town. Others were deterred from hiring the appellant after the interviews, and deterred from reassignment. (negative influence & disclosure). He was qualified and applied for numerous positions, but was not selected for any. (Ex.P- 41, pgs.2, 4, 5, 7, 8, 10, 12, 13, 14). Negative references to potential employers constituted sufficient adverse action to state a retaliation claim. *Smith v. St. Louis Univ.,* 109 F.3d 1261, 1266 (8th Cir., 1997).

5. Influence of subordinate managers, Folk and Douglass, to appellant's detriment via Negative evaluative write ups and harassment (Exs. P-14, 22, 29, 44 thru 63, etc.).

6. Apparent Influence of Fink, her manager to my detriment,(Ex. P- 23).

7. Gally used her subordinate manager Larry Akins to review my case work and have adverse input to it's evaluation of me. He is an adverse participant in an EEO complaint, in addition to her (Ex. P-35, 44, pg. 1, para. 1). Folk also participated in this evaluation.

8. The appellant's alleged failure, non reassignment, harassment and removal was Predetermined and brought about by management after Gally was transferred as Buck's TM.

9. The PIP, work environment, and management were not Bias Free, but retaliatory and hostile toward James Buck, the appellant.

10. Buck's Removal (Ex. 23). Gally recommended and assisted in.

11. Prior to the PIP, during the PIP, and after the PIP, the appellant had Pending, unresolved, and concurrent EEO complaints and litigation involving and against Gally (Ex. P-39).

Via - Joe Folk, (Folk), White male; Appellant's prior Manager, and PIP Initiator. Also, a "Brand New" manager –this was his 1st Mgmt. Group.

In addition to Gally's influence and control of Folk, there was personal animosity And retaliation toward the appellant. There were 2 grievances against Folk by the appellant – 1 was successful for James, and 1 was not allowed by Mgmt. and was to be appealed, but termination came first. (Ex.P-13, 1 copy could not be found).

1. Substantial drop in evaluation numbers by Folk – after Gally became the TM. (Exs. P-10, 11, 12, 13,).

2. Improper mid-year evaluations – Not timely. (were given 2 & 3 months prior to the Annual period ending, with little time for improvement and appeal), (Exs. P-19, 50).

3. Unduly Influenced negatively by Gally, his immediate manager who promoted &/ or helped him get it twice.

4. PIP was inaccurately based on Joe's evaluation - Erroneous case write- ups and evaluations, untimely evaluations, i.e. Mid-years, and Annuals. (Exs. P-10, 11, 12, 44 thru 63, appellant rebuttals are included.)

5. Predetermined failure for James. Knowledge of EEO complaints and litigation involving Gally, his manager (Exs. P-18, 29, pg. 6, # 29, District Court Memorandum and Order, pg. 10, lines 15 thru 17, Oct. 10th, 2007, and appellant's MSBP complaint).

6. The PIP, management, and work environment were biased, hostile, and retaliatory and Hostile against the Plaintiff.

7. Folk's written Declaration (Ex. P-29), is largely untruthful, as can be seen in the "Complainant's Response To Defendant's Statement Of Uncontroverted Material Facts," dated August 27, 2007, pgs. 2 thru 14.

Via - Danielle Douglass, Black female, and New Manager

1. Unduly Influenced negatively by Victoria, her immediate manager who promoted &/or helped her get promoted twice. Not a bias free situation, and retaliatory for the appellant.

2. 17 Write-ups were not failing and to the contrary. 2 write-ups were given after the period ending, and were the only negative ones in tone and content. (Ex. P-22).

3. There were other cases closed after the PIP, but there were not any write-ups done by Douglass.

4. James, the appellant, was allowed to keep working cases for more than 2 months after being determined as "Deficient and failing."

5. Was aware of pending EEO complaints and related litigation involving and against her manager, Gally. (Ex. P-27, pg.32, lines 11 thru 13.)

6. Knowledge of Union complaint(s) against Joe Folk. (Ex. P-13).

7. Improper PIP Implementation.

8. The plaintiff had a Union grievance against her. (Ex. P-15).

9. The PIP, management, and work environment were biased and retaliatory against the Plaintiff.

Via - Farris Fink, White male. (Victoria's manager)

1. Lack of timeliness (7 months) in response to grievance. James was not allowed "Due process" to continue the grievance of the significant decrease in ratings which the PIP was based on. (Ex. P-19, pg. 1, last 2 lines, etc.).

2. Unduly Influenced negatively by Gally. Gally was Faris' Manager that was involved in a high profile project which helped make Faris look good to his managers and others.

3. Apparent, deficiency in executing his duties of fairness, integrity, responsibility, and administration (Ex.P-27, pg.32, Lines 7-10).

4. Knowledge of concurrent EEO litigation activity involving and against Gally, prior to James' removal, (Ex. P-28, pg. 32, para. 2, lines 7 thru 9).

5. Knowledge of Union Grievance(s) against Folk and Douglass, the plaintiff's managers. (Exs. P-13, P-15).

6. The PIP, managers and work environment were biased and retaliatory.

7. Had knowledge that Prior to the PIP, during the PIP, and after the PIP, the appellant had pending and unresolved EEO complaints (Ex. P-39).

By Agency and Management

LMSB - Retaliation and Discrimination.

1. Management did not allow James to return to the Division. **(Blacked Balled)** Apparently because of a prior EEO complaint and ongoing activity with the Territory Manager Thomas Simms (White male), 2 of his managers Brenda Kessel (Kessel), a White female, and John Pope(Pope), a White male, and Gally. James had an Outstanding annual evaluation when he left that division, and at the times when he was passed over.(Exs. P-19, pg. 1, para. 2; P-41, pgs. 2,4,5,10,12,14).

2. Outside hirings with the passing over of James, who had an Outstanding Evaluation & 9 years experience doing the job in LMSB, .(Exs. P-19, pg. 1, para. 2; P-41, pgs. 2,4,5,10,12,14).

3. Inside hirings with the passing over of James. These people had less qualifications and experience than James, who had an Outstanding evaluation and 9 yrs. Experience doing the job in LMSB..(Exs. P-19, pg. 1, para. 2; P-41, pgs. 2,4,5,10,12,14).

4. Apparent Influence of Other managers in other divisions of the Agency to my detriment. (i.e. Those out of area Managers which interviewed me for other Revenue Agent jobs for which I ranked well) were referred to Gally by Douglass.

5. Apparent negative influence and collusion of LMSB managers. (i.e.TM Simms, his managers Pope, and Kessel, and possibly other managers, by and with Gally to effect non promotion selections of me, and the non lateral reassignment of me to that division, of which I was initially reassigned from during a reorganization years earlier.

6. Apparent collusion, discrimination, and retaliation. At that time and at later times there was concurrent EEO litigation related to and with Thomas Simms, Brenda Kessel, John Pope, and Gally. (Ex. P-38). At the time of earlier reassignment from LMSB, recent times after reassignment, and for some time during the PIP, my rating was very good for promotional and reassignment purposes.(Exs. P-10, 11, 12). Prior to the my PIP, during the PIP, and after the PIP, numerous internal and external hirings were taking place, in this local area, in this LMSB division, at , the regional, and national locations, at my grade and promotional levels. Yet, I was Not promoted, or reassigned at my current grade level. My annual performance rating at the time of Agency reorganization, In and from LMSB was Outstanding. It was also outstanding at the times of Internal and External hirings.

7. The work environment, and management were Not Bias Free, but retaliatory and hostile toward Buck, the Appellant.

8. Prior to the PIP, during the PIP, and after the PIP, the appellant had pending and unresolved EEO complaints and litigation (Ex. P-39). The appellant was not given a fair chance to allegedly improve.

Wrongful Dismissal – Not justified and supported – via

1. Substance – Of the Performance Improvement Period (PIP) facts & circumstances.(Ex. P-18, 19).

2. Procedural Errors – In implementation of the PIP.

3. Prohibited practices - Retaliation & Discrimination By Fink, Gally, and the Internal Revenue Service. See Aforementioned write-up.

4. Appellant's immediate manager was, unduly Influenced negatively by Gally, her immediate manager. Bias and retaliatory for the appellant.

5. 17 PIP Write-ups were not failing and to the contrary. 2 write-ups were given after the period ending, and were the only negative ones in tone and content. (Ex. P- 22).

6. There were other cases closed after the PIP, but there were not any write-ups done by Douglass.

7. Buck, the appellant, was allowed to keep working cases for more than 2 months after being determined as "Deficient and failing."

8. Douglass was aware of EEO complaints, involving her manager, Gally. (Ex. P-27, pg.32, lines 11 thru 13.)

9. Knowledge of Union complaint(s) against Folk. (Ex. P-13)

10. Improper PIP Implementation.

11. The plaintiff had a Union grievance against Douglass. (Ex. P-15)

12. The PIP, management, and work environment were biased and retaliatory.

13. Prior to the PIP, during the PIP, and after the PIP, the appellant had pending and unresolved EEO complaints and litigation. (Ex. P-39).

Procedural Errors in the Implementation of the PIP.

1. Substance – 17 contemporaneous write ups which do not support the removal. (Ex. P-18, 19, 20, 22). 2 Adverse non contemporaneous write ups subsequent to the PIP ending date. (Ex. P-22)

2. Counseling -Inadequate and improper "Counseling" by the immediate manager – Douglass. There was no mention, discussions, and written evaluative write-ups of James' performance that said he was failing and not meeting the required critical elements during the PIP, but there were those to the contrary.

3. Prohibited practices of retaliation and discrimination.

4. Duress, unconscionable time length to dismissal.

5. Pyramiding of same errors to support multiple charges of alleged failure against James. (Ex. P-22).

6. Douglass failed to follow proper guidelines, rules, laws and related in providing assistance to James.

7. Douglass failed to adequately communicate alleged failure and not meeting the critical elements to James.

8. Conflicting ratings for the critical elements and aspects. See the last 2 Annual Evaluations for 2004 and 2005. (Ex. P-12, 14, 34 pgs. 21, 22 -Eval. Critical Elements).

IX. TREATMENT OF THE ISSUES BELOW

APPEALS COURT DECISION

The Appeals Court affirmed the District Court's decision without any explanation. See that decision. A Petition for Rehearing was also denied.

DISTRICT COURT DECISION

This judge's decision was in agreement with the defendant and is erroneous. He found no discrimination, retaliation, or wrongful termination. He did not give the appropriate attention and consideration to persuasive and substantive written evidence. He also did not consider discrimination and retaliation **within** the " Wrongful termination" issue raised.

The appellee, in it's "Agency's MSPB appeal statement acknowledgement to the MSPB judge Manrose (Ex. P-26, Pg. 7,) says "the Plaintiff's removal was based on his performance ***after*** the performance improvement period." This also, agrees with the appellant's position. The appellant was removed for allegedly not successfully completing the PIP, a contradiction by the appellee. Apparently the judges gave little weight, and / or ignored this and corroborating evidence.

Race

The judge acknowledges that the appellant provided evidence of a prima facie case of race discrimination, but accepted a statement and alleged evidence by the appellee that the appellant was not

qualified to perform a position (Memorandum and Order, pg. 9, paragraph 2), when there is appellant evidence to the contrary (Ex. P-41, pgs. 7 (H-16), 8 (H-17), which support the appellant as being qualified for **2 higher levels** of the position the judge is referring to. The appellant is more than qualified, and the judge is in error.

The judge, also did not properly consider the appellant's: Statement of Material Facts, and his Response to the Defendant's Uncontroverted Facts.

Reprisal

The judge acknowledges that the appellant provided evidence of a prima facie case of race reprisal, (Memorandum and Order, pg. 10, paragraph 2), but states that there is no causal connection between the EEOC cases and the appellant's removal. He fails to properly acknowledge and address that: 1. It takes a considerable amount of time to remove a Federal employee, unless he does something really wrong; 2. That Gally was the Manager of Folk, and Douglass (Memorandum and Order, pg. 10, paragraph 2), and significant influence over them; 3. That Gally testified at the MSPB hearing that she coached Folk in putting the appellant on the PIP, and coached Douglass with the PIP; 4. There were pending EEO cases and concurrent litigation involving and against Gally, who proposed and assisted in Buck's removal; 5. There were Union grievances against Folk (Ex. P-13, 10, & 11 reissued because of a grievance) and Douglass (Ex. P-15) by the appellant; 6. There was

not a bias free, but hostile work atmosphere for the appellant; 7. A similarly situated employee, as the appellant, was allowed to return to a prior position in LMSB where there were job openings (Ex. P-41, pgs. 2,4,5, 10, 12) and the appellant was not (Memorandum and Order, pg. 8, paragraph 2); 8. Other adverse circumstances for the appellant (Ex. P-25). The judge, also did not properly consider the appellant's: Statement of Material Facts, and his Response to the Defendant's Uncontroverted Facts.

The judges also did not address that - It is also retaliatory not to hire, or rehire a qualified person because of EEO actions taken by him against the employer. This is the case with the appellant, (Ex. P-64). The appellee did not rehire him. *Sherpell v. Humnoke School District No. 5 of Lonoke County, Ark.* 874 F.2d 536

The appellant, after removal, subsequently applied for 2 IRS positions and received well qualified notices (Ex. P-64) saying that they would be in touch, but they never got in touch. This was probably because adverse information from management. If they wanted to place Buck, they could have. The statements, exhibits, and evidence provided by the Plaintiff will attest to his claims, of Retaliation, Discrimination, and Wrongful Removal.

MSPB Decision

This judge's decision was in agreement with the defendant and is erroneous. He found no discrimination, retaliation, or wrongful termination. He did not give the appropriate attention and

consideration to persuasive and substantive written evidence. He also did not consider discrimination and retaliation ***within*** the wrongful termination issue raised. A Plaintiff may seek review in district court for certain discrimination and nondiscrimination claims under 5 U.S.C. section 7703(c). The court must **not** affirm the MSPB action on the employee's non-discrimination claims if that decision is: "(1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; (3) unsupported by substantial evidence." 5 U.S.C. section 7703(c). The courts did erroneously affirm. The Plaintiff has shown that a reasonable person would accept as sufficient the substantial, preponderant evidence presented, as true more likely than untrue. 5 C.F.R. section 1201.56(c)(2)(2005). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (See "Complainant's Memorandum Opposing Defendant's (Agency) Motion For Summary Judgment Without a Hearing, pg. 6; Ex. P-34, pgs. 9-22). There are Genuine Issues as to Material Fact. (See "Complainant's Memorandum Opposing Defendant's (Agency) Motion For Summary Judgment Without a Hearing, pg. 2).

The appellee, in it's "Agency's MSPB appeal statement acknowledgement to the MSPB judge Manrose (Ex. P-26, Pg. 7,) says "the Plaintiff's removal was based on his performance ***after*** the performance improvement period." This also, agrees with the appellant's position. The appellant was

removed for allegedly not successfully completing the PIP, a contradiction by the appellee.

X. ARGUMENT AS TO THE NECESSITY OF REVIEW

A. When the U.S. DISTRICT COURT JUDGE made his decision and the Appeals Court affirmed it, were the issues of Retaliation, Racial Discrimination, and Wrongful Termination; the Facts, Circumstances, and Exhibits for making a reasonable decision in this case pertaining to treatment of applicable Title VII laws, departure from accepted and usual course of judicial treatment with the case, and the violating appellant's rights, appropriately considered?

i. The appellant was given a summary judgment, deprived of justice via a departure from accepted and usual course of judicial treatment of this case, and had his Title VII rights violated. The District Court gave substantial and undue weight to the appellee's Information, while not seeing, ignoring or taking lightly persuasive and Substantial written evidence provided by the appellant. Plaintiff Exhs. P-35, 40, 43, 47, 48, 49, 50. The Appeals court affirmed the District Court's decision and departed from usual course of judicial proceedings by it's treatment of this case.

ii. The petitioner / Appellant made an adequate showing of performance problems and harm to require a favorable decision or remand.

The Appellant, James Buck Jr. raised the issues of Discrimination, Retaliation, and Improper Termination by his former employer the IRS. Also

raised and contested is the MSPB decision, the District Court's Summary Judgment, and Appeal's Court Affirmation decision, which are erroneous. The judges **erred** in their decisions that the appellant was not discriminated against, not retaliated against, and was terminated appropriately. The MSPB and the district court were erroneous in that they overlooked, Misapprehended, misapplied, and omitted applicable case law, substantive evidential, relevant and persuasive facts and documentation that was provided by and supports the appellant / plaintiff, Buck. Mr. Buck raised and supported genuine issues of material fact. The appeals court apparently did the same thing and was erroneous in it's decision to affirm the District Court.

Discrimination

The plaintiff was removed, race discriminated and retaliated against in violation of Federal Laws - 5 U.S.C. section 7703(c), 411 U.S. 792 (1973) and related; 5 U.S.C. 2302(B)(2) and related; *Civil Rights Acts of 1964, sec. 701 et. Seq; 42 U.S.C. sec. 2000e et. Seq.;* 5 U.S.C. sec. 7703(c); and related. The judges' decisions were arbitrary, capricious, and abuse of discretion, and not in accordance with the law. 5 U.S.C. section 7703(c). **For examples:** The plaintiff , Buck, was adversely and differently treated than a similarly situated white employee and has provided evidence required for a prima facie discrimination case, as required by the Supreme Court in *McDonnell Douglas Corporation v. Green, 411 U.S .at 802.* This case sets forth a three part evidentiary

inquiry to be used in addressing cases of disparate treatment discrimination. The District Court found that Buck established a prima facie case of discrimination. (See the District Court Memorandum and Order, page (pg) 8, paragraph (para.) 2, line (Ln.) 1). The court also **erroneously** found that the appellee supported his burden showing a nondiscriminatory reason for the employment decision to retain the similarly situated white employee, and not Buck as well. The judge **erred** in his determination that the Plaintiff was not qualified for the position that the similarly situated white employee got, and that this requirement was not met by the plaintiff, and failed the issue. The judge refers to alleged appellee provided evidence refuting Buck's qualifications but does not cite and say what it is. There is none. (See the District Court Memorandum and Order, page (pg) 9, paragraph (para.) 2, lines (Lns. 3-5). The appellant had provided sufficient supportive evidence and documentation (from the Appellee) **that met this requirement**, (see plaintiff exhibit P-41 job qualifications MPQ, pgs. 7 / (H 16), & 8 / (H-17), but it was not acknowledged by the judge. Nor was it acknowledged by the Appeals Court. It was in the appellant's brief and the record. If the appellant can show that the District Court failed to consider a relevant factor that should have received significant weight, gave significant weight to an improper or irrelevant factor, or considered only appropriate factors but nevertheless committed a clear error of judgment, his decision is unreasonable. *Cardenas v. AT& T Corp.*, 245, F.3d 994, 998 (8th Cir. 2001); *U.S.A. v. Cadenas, 445 F.3d*

at 1094. -"@@"- Referenced Below.This was true and worked adversely for the Plaintiff. The District Court was in error, and the Appeals Court was also in error for it's affirmation. Additionally, it must be clear from the record that a District Court considered the factors listed when it decided. This was not the case. The judge also **erred** in his determination that the Plaintiff has not has not provided evidence sufficient to support a jury finding in his favor and that the Defendant's proffered reason for removal was not pretextual. (See the District Court Memorandum and Order, page (pg) 9, paragraph (para.) 3. The following aspects show pretext: 1. Gally was the Manager of Folk, and Douglass, Buck's Managers, (Memorandum and Order, pg. 10, paragraph 2), and worked through them to harass, retaliate, and discriminate against Buck; 2. Gally testified at the MSPB hearing that she coached Folk in putting the appellant on the PIP and terminating him, - a motive, and coached Douglass with the PIP - a motive; 3. There were pending EEO cases and litigation originated by Buck, involving and against Gally who proposed Buck's removal - a motive, (P-27, MSPB Initial Decision pg. 29, footnote 4, P-37, P-38, & P-39); 4. There were Union grievances against Folk (Ex. P-13, 10, & 11 reissued because of a grievance) and Douglass (Ex. P-15) by the appellant - motives; 5. There was not a bias free work environment, but hostile for the appellant - a motive; 6. A similarly situated employee, as the appellant, was allowed to return to a prior position in LMSB where there were job openings (Ex. P-41, pgs. 2,4,5, 7 / (H 16) , 8 / (H-17), 10, 12) and the appellant was

not (Memorandum and Order, pg. 8, paragraph 2), this in itself is Probative evidence of pretext in a *Title VII action, Civil Rights Act pg 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e et seq.*; 7. Other adverse feelings, harassment, retaliation, and other adverse circumstances inflicted on the appellant, (Exh. P-44 thru 63 Folk write ups and Buck's rebuttals). 8. Immediately Prior to Gally's becoming the Group's TM and working with Folk, Buck received performance awards from Folk, and with the prior Group's TM, certified Buck as Management ready. (P-10, P-11, & P-12); 9. In about 21 months, Folk and Gally brought Buck's performance ratings down from "Outstanding to Failing." Buck's exh. (P-7, P-10, P-11, P-12, and P-16, - a motive.

The aforementioned, shows pretext and inferences for retaliation and discrimination. The judges, did not properly consider them. The MSPB judge did not properly consider the Plaintiff's documentation, and testimony, (i.e. part of the improper removal, *is that it was done with harassment, retaliation and discrimination,* as was mentioned and in the record from the beginning. (Appellant Brief pgs. 20 thru 23). The plaintiff's responses and documentation to the specific job examples were not addressed by the judges. (Exh. P-18 and P-19). See *Cadenas,*445 F.3d at 1094, and Cardenas -"@@"- reference pg. 25. The District Court was in error, and the Appeals Court was also in error for it's affirmation. Additionally, it must be clear from the record that a District Court considered the factors listed when it decided. This was not the case. The Plaintiff has shown that a

reasonable person would accept as sufficient the substantial, preponderant evidence presented, as true more likely than untrue. *5 C.F.R. section 1201.56(c)(2)(2005).* There are Genuine Issues as to Material Fact and Fed.R.Civ P.56(c) is not applicable, ## - pg. 31; there is Substantial Evidence supporting the appellant's position and the court must not affirm their decisions. In Discrimination cases "Summary Judgment" should seldom be used - "%",- referenced pg.31; *Johnson v. Minnesota Historical Socy,* 931 F.2d 1239, 1244 (8th Cir. 1991). *Hildebrand v. M-Tron Industries, Inc.,* 827 F.2d 363, 364 (8th Cir. 1987). "Summary Judgment" is appropriate only in those rare instances where there is no dispute of fact and where there exists only one conclusion. Because discrimination cases often depend on inference rather than on direct evidence, Summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant. *Eric Crawford v. Runyon, Postmaster General, United States Postal Service,* 37 F.3d 1338, 1340 (8th Cir. 1994). *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150-51, 120 S. Ct. 2097, 147 L. Ed 2d 105 (2000). *Salitros v. Chrsyler Corp.,* 306 F.3d 562 (8th Cir. 2002). The Appeals Court decision is also contrary to the above mentioned laws.

Retaliation

The appellant, Buck, alleges that he was terminated because of EEOC complaints against

members of the IRS, in particular Gally. Using the aforementioned Supreme Court case, *McDonnell Douglas Corporation v. Green* framework the requirements for establishing a prima facie case are distinct. See *Equal Employment Opportunity Commission v. Kohler Co.,* 335 F.3d 766, 772 (8th Cir 2003). The Plaintiff must show that 1) he engaged in statutorily protected activity; 2) he suffered an adverse employment action; and 3) there was a causal connection between the adverse employment action and the protected activity. The burden shifting approach then applies as articulated above. *Id. At 773; see also Gilooly v. Missouri Department of Health and Senior Services,* 421 F. 3d 734 (8th Cir.2005). The defense may rebut a plaintiff's claim by advancing a legitimate, nondiscriminatory reason for the adverse employment action. The District Court judge determined that the first two elements were satisfied. (pg. 10, 2nd para., line 1 of the District Court Memorandum and Order.) He also states that the "plaintiff has not presented the court with any evidence of a causal connection. The only evidence provided is that Gally was named in one EEOC complaint, and that the plaintiff's two immediate supervisors knew about the complaints. This does not show any retaliatory motive." (pg. 11, para.3, lines 1 thru 4.) The judge erred in his determination and decision. The plaintiff has presented numerous items of evidence and support of a causal connection and motives by Gally, the agency, and others. The following aspects show a casual connection and pretext: 1. Gally was the Manager of Folk, and Douglass, Buck's Managers,

(Memorandum and Order, pg. 10, paragraph 2), and worked through them to harass, retaliate, and discriminate against Buck (they knew of the EEO cases & litigation against Gally (P-27, pg. 32, para. 2, lines 3 and 4; District Court Memorandum and Order, pg. 10, foot note 3.- a causal connection adverse to Buck); 2. Gally testified at the MSPB hearing that she coached Folk in putting the appellant on the PIP, - a motive, and coached Douglass with the PIP- a motive; 3. There were **two** pending EEO cases **(concurrently being litigated)** originated by Buck, involving and against Gally who proposed and assisted in Buck's removal - a motive for retaliation, (P-37, P-38, & P-39; P-27, pg. 32, para. 2, lines 5,6,& 7); 4. There were Union grievances against Folk (Ex. P-13, 10, & 11 reissued because of a grievance) and Douglass (Ex. P-15) by the appellant - motives; 5. There was not a bias free work, but hostile environment for the appellant - a motive; 6. A similarly situated employee as the appellant, was allowed to return to a prior position in LMSB where there were job openings (Ex. P-41, pgs. 2,4,5, 7 (H 16), 8 (H 17), 10, 12) and the appellant was not (Memorandum and Order, pg. 8, paragraph 2), this in itself is Probative evidence of pretext in a *Title VII action, Civil Rights Act pg 1964, Section 701 et seq.,* 42 U.S.C.A. Section 2000e et seq; 7. Other adverse feelings, harassment, retaliation, and circumstances inflicted on the appellant with Folk's and Douglass' lack of credibility, (see the Reply Brief of the Appellant, pg. 4, 5, 6, 14 para. 2, line 3 and example #1; pg. 15, para. 2, line 1 and example # 2; Exh. P-44 thru 63 - Folk write ups and Buck's

rebuttals). 8. Immediately Prior to Gally becoming the Group's TM and working with Folk, (temporal proximity) Buck received performance awards from Folk, and with the prior Group's TM, certified Buck as Management ready. (P-10, P-11, & P-12); 9. In about 21 months, Folk and Gally brought Buck's performance ratings down from "Outstanding to Failing." Buck's exhs. (P-7, P-10, P-11, P-12, and P-16, - a motive. Performance issues were raised and harassment made to deter and punish Mr. Buck for the EEO filings and concurrent activity against and involving Gally and the agency. The aforementioned, shows causal connections, pretext and inferences for retaliation and discrimination. The judges, did not properly consider them. The MSPB judge did not properly consider the Plaintiff's documentation, and testimony, (i.e. part of the improper removal is that it was done with harassment, retaliation and discrimination), as was mentioned and in the record from the beginning. (Appellant Brief pgs. 20 thru 23). The plaintiff's responses to the specific job examples were not addressed by the judges. (Exh. P-18 and P-19), " @@" - see pg. 25. *Cadenas,* 445 F.3d at 1094 *and Cardenas.*The District Court was in **error,** and the Appeals Court was also in error for it's affirmation, and is contrary to the above mentioned laws. Additionally, it must be clear from the record that a District Court considered the factors listed when it decided. This was not the case. The Plaintiff has shown that a reasonable person would accept as sufficient the substantial, preponderant evidence presented, as true more likely than untrue. 5 C.F.R. section 1201.56(c)(2)(2005). There are Genuine

Issues as to Material Fact,. (See "Complainant's Memorandum Opposing Defendant's (Agency) Motion For Summary Judgment Without a Hearing, pgs. 2,and 6; Ex. P-34, pgs. 9-22). There are Genuine Issues as to Material Fact. ## - pg. 27. There is Substantial Evidence supporting the appellant's position and the court must not affirm their decisions. In Discrimination cases, "Summary Judgment" should seldom be used- " % "- see pg. 27. The above cases and examples show how this District Court, Appeals Court, and MSPB have decided contrary to the cited laws, and procedures. A review is in order.

Improper Removal

The appellant, Buck states that the MSPB and District Court decisions were erroneous. The MSPB and the District court were erroneous in that they overlooked, misapprehended, misapplied, and omitted applicable case law, substantive evidential, relevant and persuasive facts and documentation that was provided by and supports the appellant, Buck. Mr. Buck raised and supported genuine issues of material fact. The appeals court apparently did the same thing and was erroneous in it's decision to affirm the District Court. The plaintiff was removed, race discriminated and retaliated against in violation of Federal Laws - 5 U.S.C. section 7703(c), 411 U.S. 792 (1973) and related; 5 U.S.C. 2302(B)(2) and related; *Title VII Civil Rights Acts of 1964, sec. 701 et. Seq;* 42 U.S.C. sec. 2000e et. Seq.; 5 U.S.C. sec. 7703(c); and related. The judges' decisions were (1)

arbitrary, capricious, and abuse of discretion, and not in accordance with the law; (2) obtained without procedures required by law, rule, or regulation having been followed; and (3) unsupported by substantial evidence." 5 U.S.C. section 7703(c), and the court must **not** affirm them.

Buck was removed based on the proposed letter of removal charges, which were said to be applicable if the PIP was not successfully completed by Buck. Buck's responses to each of these charges (P-18, & P-19) were not properly considered by the MSPB judge, or District Court and are not mentioned at all in his considerations. The judge did not properly consider the Plaintiff's documentation, and testimony, (i.e. **part of** the improper removal, is that it **was done with harassment, retaliation and discrimination**), as was mentioned and in the record from the beginning. (Appellant Brief pgs. 20 thru 23). For example: Folk's, Proposed letter of removal, and many prior write-ups leading up to it, had many falsehoods and allegations in them that were not addressed by the judge. Performance issues were raised and harassment made to deter and punish Mr. Buck for the EEO filings and concurrent activity against and involving Gally and the agency. Nor were Buck's and the Union Steward 's responses to them. (P-18, P-19, P-44 thru P-63). Folk's statement on Appellee Appendix ("AA" P322, # 4) is an example of a False hood: He states - "as I began to manage the SBSE unit, **I observed some serious issues with plaintiff's work.**" (Reply Brief Appellant, pg. 4, para.2, line 1.) **This is proven false by Buck's** annual Performance

Appraisal ratings **of Outstanding,** and **Very Good, by Folk**, (P-10, P-11). The judge **did not give** proper consideration to the fact that there were **Pending** EEOC cases involving and against Gally, being litigated prior, during, and after Buck's PIP, and Termination,- a considerable retaliatory and adverse motive for Buck. See *Cadenas,* 445 F.3d at 1094, et al.- "@@"- reference pg. 25. The District Court was in error, and the Appeals Court was also in error for it's affirmation. The Plaintiff has shown that a reasonable person would accept as sufficient the substantial, preponderant evidence presented, as true more likely than untrue. 5 C.F.R. section 1201.56(c)(2)(2005).

Buck contends that he did successfully complete the PIP. Based of the Appeal Acknowledgement statement to the MSPB judge (P-26), the appellant did successfully complete the PIP, but later abused the system and was removed. Appellee brief, pg. 10, para. 2, refers to Buck's argument about the agency contradicting itself with regard to his removal for unacceptable performance, and that he was not notified of this change. The agency **did contradict itself and it's position** about Buck's removal, in it's "Appeal acknowledgement " statement to MSPB Judge Manrose. The appellee, in it's "Agency's MSPB appeal statement acknowledgement to the MSPB judge (Ex. P-26, Pg. 7,) says "the Plaintiff's removal was based on his performance *after* the performance improvement period." The appellant was removed for allegedly not successfully completing the PIP, a contradiction by the appellee. While the Agency, now claims this statement was an error, it cannot claim

that the "Six" (6) months **after** the PIP ending date, that Buck was allowed to do his job, (I.e. work his cases) was an error too. This subsequent PIP 6 months, further confirms Buck's Position of successfully completing the PIP. Why would the agency keep a deficient employee on the payroll for 6 months "after" being determined deficient? They did not. The agency's claim to a mistake, **Fails**. This also, agrees with the appellant's position that he did successfully complete the PIP. Buck received no notice saying that his performance declined after the PIP. Again, Douglass' 17 PIP evaluative write ups, Buck's exh. (P-22), do not say that Buck failed the PIP, but the contrary. Douglass makes these comments about Buck's work: "Good Job." – AA P185, 187, 189, 214, 216, & 217; "Excellent" – AA P186; He planned his work – AA P184, 188, & 212; He had minimal time charges – AA P 185, 187, 189, 191, 214, 216, and 217; He worked it (the case) timely –AA P191; He followed the proper procedures, etc. - AA P185, 187, 189, 214, 216, & 217.

Also false, are most of Douglass' statements in her declaration, AA P327-334, and her last 2 PIP write-ups, #18, and #19, AA P233 & 239) that were written after the PIP ending date of 7-1-05. Buck rebutted them, see AA P236-238, P241-242, and Buck's exhibit (P-22, pgs. 38, *51, & 43, *56). Buck's exhibits (P-18, Chief Union Steward's statement contesting the adverse decision, & P-19) further clarify the situation.

The acknowledgement (P-26, Pg. 7 (*T7), 1st para., **clearly states** that, "He was specifically notified that

his removal was based on the decline in his performance **After** the PIP." The acknowledgement also equates Buck as a " Roller Coaster" employee who was abusing the system, i.e. improving performance only enough during the PIP to be marginal and escape removal, but later declines again and becomes nonacceptable, (P-26, pg. 5, (*T5), para. 1, and pg. 6, (*T6)). Buck was not specifically notified as stated, and was not a Roller Coaster employee who abused the system. This accusation is slanderous and libelous to Buck, and is on the records here and to the Public at Large. Buck has been slandered and libeled. The "Appeals Acknowledgement" is also noted in Buck's brief pgs. 37, 39, and 46. The agency terminated Buck for not successfully completing the PIP, and Not for a decline in performance *After* the PIP, as stated. Buck's position is correct.

XI. CONCLUSION

The Appeals Court has departed from the it's accepted and usual course of judicial proceedings by it's treatment of this case and has sanctioned such a departure by lower courts. As stated in it's prior case, "Summary judgment should seldom be used- " %" - see above reference pg. 27.

Adverse action occurred **during** protected conduct, "the ongoing and pending EEO litigation" being pursued by Mr. Buck, which was the causation of the adverse action against him. See *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001).

Temporal proximity between an employer's knowledge of protected activity and an adverse employment action is sufficient evidence of causality. *Gorman-Bakos v. Cornell Cooperative Extension of Schenectady Cty.*, 252 F.3d 545, 554 (CA 2001). *Conner v. Schnuk Markets, Inc.,* 121 F. 3d 1390, 1395 (CA 10), (1997).

The District and Appeals Court have decided an important Federal question in a way that conflicts with relevant decisions of this Court, the applicable Title VII and other laws. The judges did not properly consider the Plaintiff's documentation, and testimony, (i.e. **part of** the improper removal, is that it **was done with harassment, retaliation and discrimination**), as was mentioned and in the record from the beginning. (Appellant Brief pgs. 20 thru 23).

The Appellant, Buck, has shown that there are Genuine Issues of Material Fact and Issues that were not properly addressed by the Appeals Court, the District Court, or the MSPB; Clear errors of judgment, have been committed, 5 C.F.R section 1201.56(c)(2)(2005). *Cadenas,* 445 F.3d at 1094 and *Cardenas,*- see '@@" - see pg. 25.

It is not a coincidence that 1. The appellant's evaluation ratings dropped substantially over a short period of time, about 21 months, and from "Outstanding to failing" by Folk and Gally (Temporal Proximity); 2. That there was a 1 sided vendetta by Folk toward the appellant under Gally's management, (she stated under oath that she helped and mentored Folk adversely against the appellant); 3. That Fink did nothing positive to alleviate the

situation for the appellant; that Douglass and Folk worked on Gally's behalf against the appellant, with grievances against them by the appellant. It was in the plans by them, as retaliation. How could the plaintiff sustain this without being terminated?

Performance issues were raised and harassment made to deter and punish Mr. Buck for the EEO filings and concurrent activity against and involving Gally and the agency.

As was seen, the appellant was not given the same treatment as Leeker, and was adversely discriminated against.

It has been clearly demonstrated that Complainant has produced admissible factual evidence sufficient to demonstrate the existence of genuine issues of material fact. The Plaintiff has shown that there are specific material facts and genuine issues for trial. *Osborn v. E.F. Hutton & Co., Inc.,* 853 F.2d 616, 618 (8th Cir. 1988) citing *Celotex Corp.,* 477 U.S. at 322-323. The Plaintiff has shown that a reasonable person would accept as sufficient the substantial, preponderant evidence presented, as true more likely than untrue. 5 C.F.R. section 1201.56(c)(2)(2005). As a matter of law, It is proper for this matter to receive a favorable ruling by this court or at least be adjudicated with a jury trial, and the appellant so requests. The appellant was in fact retaliated, racially discriminated against, and was wrongfully terminated by the Agency on the basis of his protected actions, EEO complaints, related and other, Prior to his separation, upon, and after his separation January 6, 2006. Subsequent Agency

actions have also adversely affected the complainant (i.e. adverse employment references, etc..)

Respectfully submitted,

James A. Buck, Jr., - Pro Se
12570 Danube, Dr.
Florissant, Mo. 63033
(314) 837-8996

Date: _____